

## **THE CRISES OF A HUNG PARLIAMENT** **&** **THE ROLE OF THE PRESIDENT**

The subject "Hung Parliament and the President's Powers" is of deep interest to our nation in the current context. Though in the recent General Election the pre-poll alliance namely the National Democratic Alliance has secured an absolute majority of the Lok Sabha and has broken the vicious circle of minority governments, the possibility of reservation to the earlier situation with "Hung Parliament" cannot be said to have been solved. As long as the system of first past the post remains in a multi party system Hung Parliaments are inevitable. Earlier, India had seven governments in ten years none of which had a stable majority in the Lok Sabha. I myself had the dubious distinction of having appointed three and working with four Prime Ministers during my term of five years. The fourth Republic of France which had a Parliamentary form then, had 22 governments in 12 years from 1946-1958. This situation was rectified by the constitution adopted in 1958 at the initiative of De Gaul. Therefore the volume by Archana Sinha "The Crisis of a Hung Parliament – The role of the President" is both topical and timely. The author who is Judicial Officer in Delhi has collected a lot of materials regarding the position of the President of India and compared them with the President of the United States of America and the President of the Fifth Republic of France. The author examines the status of the President of India under the Constitution and analyses his power in respect of two items. One relates to the appointment of the Prime Minister and the other to dissolution of the Lok Sabha. If after a general election a single party gets an absolute majority of the Lok Sabha, the appointment of leader of the majority party is a routine act by the President. From 1952 to 1977 the Congress Party in India won majority seats in the general elections and presented no problem to the President. In 1977 the Janata Party, which was a pre-poll alliance of a number of parties, the Janata and BJP etc., secured a majority of seats in the Lok Sabha and hence presented no difficulty to the President. However when the pre-poll alliance split by the BJP withdrawing their support to the government and Prime Minister Morarji Desai resigned the President of India was faced with the problem of choosing the next Prime Minister. Later in 1989, 91, 96 when the government was defeated in the polls and no single party secured a majority in the House, the President was faced with the problem of appointment of the Prime Minister.

The author expresses several times in her discussion that the Constituent Assembly either failed in its responsibility or inadvertently overlooked making provisions for choosing the Prime Minister in cases where there were no single party commanding majority of the House.

A study of only the statute law relating to a nation without the conventions will be incomplete and distorted. Constitutional Conventions consists of various customs, practices, maxims and principles of political ethics. Statutes and conventions together constitute the constitutional law of the land.

For instance in England the Crown has the power to appoint the Prime Minister. In fact up the 18<sup>th</sup> Century the Crown appointed its favorites as the Prime Minister. But the present convention that the Crown must invite leader of the majority party in the House of Commons is one that can no longer be violated. Though this principle is not incorporated in our Constitution, the convention nevertheless has been observed in last 50 years. Again the British convention that the other ministers shall be appointed on the advice of the Prime Minister is embodied in Art.75 (1).

Like -wise the British convention that in the exercise of its legal powers, the Crown shall act in accordance with the aid and advice of the Council of Ministers is incorporated in Art.74 of the Constitution. Even before the amendments 42 and 4 to Art.74 the Supreme Court held in Samsher Singh case (1974) that the President was only a Constitutional head and that he was bound to act according to the advice of the council of ministers. Ivor Jennings the expert on constitutional law stated that “The President of India is essentially a constitutional monarch. The machinery of government is essentially British and the whole collection of British conventions has been incorporated “as conventions”. Therefore any gap in the statute law of India has to be filled by British conventions wherever appropriate.

The most important function of the Crown in England and the President of India is the appointment of the Prime Minister. As Ivor Jennings said “The King has only one function of primary importance. It is the appointment of the Prime Minister”.

The author has rightly pointed out that the Constitution is silent on what the President should do if no party has a majority in the House and has stated in page 67 of the volume “that the English conventions are not of much help at all for meeting the situation of “Hung Parliament”. The author proceeds to suggest “that time has arrived for Parliament to have another Constituent Assembly, which could suggest necessary amendments in the power and functions of the Indian President to tackle eventualities of a Hung Parliament”. I wonder why a Constituent Assembly is necessary when we have Art.368 for amending the Constitution.

The author is absolutely correct in saying that since British has a well defined two party system, one or the other gets a majority in the House and that situation without a party with a majority seldom arise. But British Constitutional history shows that here has been atleast one occasion when the Crown had to face a “Hung Parliament”.

In 1923, the Conservative Prime Minister Baldwin advised the dissolution of the House as he wanted to get a mandate from te electorate for his Tariff Policy and the crown accepted it. In the general election, which followed in December 1923, the Conservative government was defeated but the Conservative Party still remained the largest party with Labour party and the Liberal party in descending order of strength, a situation exactly similar to the one in 1989- when Rajiv Gandhi government was defeated, but the Congress Party remained the largest party. The King, George V, said that (quote) “ if Baldwin wished to resign he (the King) would refuse on the largest single party in the House of Commons” (quoted from Baldwin by Montgomery Hyde p.197). When Baldwin was defeated in the House in January 1924 on an address to the throne the King had the option of calling the Ramsay Mac Doland leader of the Labour Party with 191 members or Asquith the leader of the Liberal party with 158 members. The King invited Ramsay Mac Donald (quote) “as the leader of the next largest party in the Commons to form the administration (quoted from Baldwin by Hydep.199). this is exactly what the then President did when Rajiv Gandhi, on grounds of high morality, declined to stake his claim to form the Government even though he was still the largest single party in 1989. The President called on the next largest party headed by VP Singh to form the government.

I have cited this case somewhat elaborately only to establish that the President of India has discretion in such maters. When the government is defeated in the polls, there is no body or authority with the mandate from the people to govern and therefore has no authority to aid or advice the President. The President has discretion to appoint the Prime Minister but that discretion is limited to the choice of one who in the opinion of the President is capable of winning the confidence of the House.

In my farewell address to Parliament, I summed up the position of the President of India as follows: The President is not an appellate or supervisory authority over the Prime Minister. Each office functions within the ambit of the powers defined in the Constitution. The President is like an emergency lamp. It comes into operation when political power fails and becomes dormant when power is restored. A Hung Parliament is one of the occasions in which political power has failed and the emergency lamp takes over the situation.

While the principle of inviting the largest single party is a normal rule, there may be occasions when the President may not call the leader of the largest single party but the leader of a pre-poll alliance of a number of parties if they command a majority in the House. The President's discretion (unless otherwise vitiated) cannot be called in question.

It therefore appears to me correct to leave it to the President to exercise his discretion according to circumstances of each case than fetter his discretion with statutory regulations.

The author has tried to draw a line of distinction between Art.53 which states that the executive power shall be vested with the President and shall be exercised by him or through officers subordinate to him in accordance with this constitution and Art.74 which says that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The author emphasises that in respect of "powers" the President can act free of advice of the Council of Ministers. It is a very intelligent argument based on the different in language in the two Articles. However Art.53 itself mentions that the "Powers" vested in the President shall be exercised in accordance with this constitution. Therefore, whether it is President's powers under Art.53 or President's functions under Art.74, they are exercisable in accordance with this Constitution i.e. with the aid and advice of the Council of Ministers. The Supreme Court has also held that Art.74 is mandatory and therefore the President cannot exercise his executive powers without the aid and advised of the Council of Ministers. In fact as I shall show later even in matters under Art.74 there may be extraordinary occasion when the President may not act on the advice of the Council of Ministers.

The second point dealt with in this volume is the President's powers regarding dissolution of the House. The author rightly argues that the President has the option to accept or reject the advice of the Prime Minister. Here also the British precedents are very helpful.

The British Convention may be summed up as follows:

1. The sovereign should normally dissolve the Parliament when requested by the Prime Minister to do so.
2. The sovereign shall not dissolve the House unless requested by the Prime Minister to do so.

Opinion is however divided on whether the advice of the Prime Minister who has been defeated in the House is binding on the Crown. Some jurists hold that the advice to dissolve the House tendered by Prime Minister whether defeated or in office is binding on the Crown and that the advice had not been rejected by the Crown in the last one hundred years and that the sovereign's right to refuse dissolution has become obsolete (vide Halsbury's Laws of England 4<sup>th</sup> ed. Vol8 para 939).

On the other hand Ivor Jennings says that "in nearly all cases she (the Queen) acts on the advice of the ministers "but in exceptional circumstances, the crown would be justified in refusing to accept such advice. Ivor Jennings mentions that "if Mr. Chamberlain had (as he would not have thought of doing) advised dissolution in May 1940 when the Germans were invading Belgium the King would have been justified in refusing". Thus in exceptional

circumstances, such as the one quoted by Ivor Jennings, the President of India would be justified in refusing to accept the advice following the British convention.

Adoption of the British model of government implies adoption of the conventions also. I entirely agree with the author that the President of India has discretion to accept or refuse the advice of the Prime Minister who has been defeated since on his defeat in the House or the polls he no longer represents the general will of the people.

The author has confined her attention only to the two items discussed herein and in both of them the conventions of the British system are in my opinion adequate. That does not take away the validity of the alternatives suggested by the author. She has elaborately argued for the statutory provisions for avoiding any possible crisis or breakdown of the Constitution. No Constitution is or can be perfect. Nor can it provide for all possible present and future contingencies. Providing for every imaginable situation by law is well high impossible as conditions and concepts change with the times. That is why even written constitutions have developed a number of conventions.

The question whether advice of a government defeated in the House or at the polls but which has been asked to continue till alternative arrangements are made i.e. a caretaker government is binding on the President remains a gray area of doubt. A defeated government continuing in office as per the letter of the Law is no different from the Council of Ministers and therefore it would appear that its aid and advice is binding on the President. But according to political theory what invests the council of ministers the authority to aid and advice the President is its status as the representative of the people. Once they forfeit their representative character, they lose their right to govern. Since the interval between the dissolution of the House and the election of a new one is very short in Britain no case of the "caretaker" government seeking to exercise substantial powers has come up. But in India the interval is unconscionably long as in 1979 and 1999 that restraint on the powers of caretaker government had become necessary. President Sanjeeva Reddy declined to approve the proposal for state funding of elections of Charan Singh government on the ground that it was a new policy. I had declined to approve a contract involving 4000 crores by Chandra Sekhar's caretaker government. The rule generally followed is that pending elections the caretaker government shall not commit the future government to heavy financial burdens or to new political policies. This is an area where statutory regulation of the powers of a caretaker government is called for.

As a thought provoking exercise the volume I am releasing deserves to be welcomed. The author has tried to bring some fresh and original thoughts on the Article 53, 74 and 75 of the constitution. She has also suggested some alternative amendments to the constitution. They deserve the attention of jurists and statesmen. Perhaps the author may come up in due course with a comprehensive treatise dealing with the entire subject of the President of India so that it may be of use to the lawyer the politician and the public.

I have great pleasure in releasing the Book "The Crisis of a Hung Parliament, The role of the President" and I wish the author all success.